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No. __-___

IN THE

Supreme Court of the United States

RICHARD VALLEE,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For Writ of Certiorari to the United States Court of Appeals for for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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May 29, 2009

QUESTIONS PRESENTED

In *Giles v. California*, __ U.S. __, 128 S.Ct. 2678, 2687 (2008), this Court held that the forfeiture-by-wrongdoing doctrine applies "only if the defendant has in mind the particular purpose of making the witness unavailable." The questions presented by this case are:

> Does the post-*Giles* super-intent forfeiture rule apply only in the proceeding from which it was the defendant's purpose to procure the witness' absence; or does the doctrine also apply in a subsequent proceeding involving the same defendant but a different offense?
>
> More specifically, does the forfeiture exception to the right to confrontation apply in a subsequent case for the murder of that witness, even though it is the very conduct for which the defendant is on trial that forms the basis for forfeiture?

PARTIES TO THE PROCEEDINGS

The parties to the proceeding in the United States Court of Appeals for the Second Circuit included the United States of America and Richard Vallee. There are no parties to the proceedings other than those named in the petition.

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PETITION FOR WRIT OF CERTIORARI

Richard Vallee petitions this Court for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit filed on December 30, 2008.

OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit was filed on December 30, 2008, and is attached as Appendix 1a. It is unreported.

JURISDICTION

The decision of the United States Court of Appeals for the Second Circuit was filed on December 30, 2008. No petition for rehearing was filed. Petitioner filed a timely application to extend the time to file a petition for writ of certiorari on March 13, 2009. On March 19, 2009, the application was granted by Justice Ginsburg, extending the time to file until May 29, 2009. This petition is filed prior to that date. The jurisdiction of this Court rests on 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. CONST. amend. VI.

STATEMENT

Petitioner, Richard Vallee, was convicted after a jury trial in the United States District Court for the Northern District of New York of using an explosive to destroy a vehicle used in interstate commerce, 18 U.S.C. § 844(i), and murdering Lee Carter, a paid government informant, to prevent communication of information to a federal law enforcement officer, 18 U.S.C. § 1512(a)(1)(c). At trial, the prosecution, over petitioner's objection, offered out-of-court statements made by Carter inculpating Richard Vallee. Petitioner appealed, arguing that the admission of Carter's testimonial hearsay violated his rights under the Confrontation Clause and his right to a trial by jury. The United States Court of Appeals for the Second Circuit affirmed his conviction.

I. Trial Proceedings

A. Admission Of Carter's Testimonial Hearsay Statements

On July 28, 1993, Lee Carter was killed when a bomb caused his car to explode. At the time of his death, Carter was scheduled to testify against Vallee in a criminal case in which Vallee and others were charged with conspiracy to import 54 kilograms of cocaine into Canada.

At Mr. Vallee's trial for the murder of Carter, the prosecution, in its case-in-chief, offered statements made by the deceased Carter implicating Vallee in the cocaine smuggling conspiracy. (Decision &

Order, Hon. Thomas J. McAvoy, dated Jun. 19, 2007, at p. 2) (App. 15a). These statements, they argued, proved Vallee's motive to kill to prevent Carter from testifying during the drug prosecution. Petitioner objected to the admission of the hearsay statements citing the Confrontation Clause. *Id.*

The trial court admitted the evidence under Federal Rule of Evidence 804(b)(6), which permits the admission of "a statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness." Fed. R. Evid. 804(b)(6). After a hearing, the district court found that Vallee was guilty of murdering Carter to prevent his testimony in the narcotics case by a preponderance of the evidence. (Decision & Order, Hon. Thomas J. McAvoy, dated Jun. 19, 2007, at p. 6) (App. 22a). Upon that determination, the trial court held that Rule 804(b)(6) permits admission of Carter's statements under the forfeiture-by-wrongdoing doctrine. The testimonial hearsay statements were presented to the jury.

B. The Prosecution's Case

The prosecution's case rested upon evidence linking Vallee to the bombing and evidence of Vallee's motive to kill Carter.

The Canadian prosecutor who had been assigned to the drug conspiracy case testified that she told Vallee's attorney that there was only one witness who could identify Vallee – Lee Carter. (Tr.[1] 323,

[1] Tr. refers to the trial transcript of the district court proceeding.

330-331, 335). She also informed the jury that under Canadian evidentiary rules, when a witness dies their testimony becomes inadmissible. (Tr. 341).

Law enforcement witnesses offered forensic testimony regarding the crime scene where Carter's vehicle exploded. One testified that he found a six-volt lantern battery at the crime scene. (Tr. 370, 418-419). He was not able to identify the specific type of explosive. (Tr. 402). An ATF explosives enforcement officer testified that there was no evidence of what actually detonated the bomb. (Tr. 437, 447).

A Canadian Detective testified that on February 16, 1994, while watching Vallee's apartment on an unrelated matter, he arrested an individual named Carlo Farruggia, who was in close proximity to the apartment, for possession of brass knuckles. (Tr. 508). Farruggia also had a briefcase containing cash. (Tr. 500). Another Canadian Detective testified that in Farruggia's vehicle he seized a 7.65 millimeter weapon and a detonator. (Tr. 540).

A member of the anti-motorcycle gang squad of Sureté de Quebec (Tr. 554), testified that while in custody he questioned Mr. Vallee "concerning a murder." (Tr. 557). He testified that Mr. Vallee offered an outright admission that he "blew up" Carter. (Tr. 564). On cross-examination, the translation of the purported admission (which was made in French) was debated and questioned. (Tr. 578).

It was admitted that no electronic recording of Mr. Vallee's purported admission was made.

Hells-Angel-turned-federal-witness, "Eric Archambault,"[2] testified that he was an acquaintance of Richard Vallee, with whom he dealt drugs as members of the Hells Angels. (Tr. 607, 613, 616). While at a party, in late summer of 1993, "Archambault" claims to have overheard Vallee state that "he was celebrating the asshole that he had blown up on the other side." (Tr. 614). "Archambault" understood "the other side" to mean the United States. *Id.* "Archambault" was a practiced cooperator and witness, having testified against members of several motorcycle-related clubs and gangs. *Id.* In return for his testimony, "Archambault" was given a new identity and cash by Quebec authorities. *Id.*

A Canadian law enforcement officer testified that he executed a search warrant at an apartment leased to a Martin Ross, and found a briefcase with various tools, electronic equipment, detonators, and batteries. (Tr. 659-661, 665-670). A crime scene technician testified that a fingerprint on one of the bags and on a battery pack recovered from Martin Ross' apartment matched Vallee. (Tr. 711, 716). Farruggia's fingerprint was also found on the outside surface of a bag. (Tr. 718-719). A Canadian police sergeant testified that the materials found in Ross' apartment could be useful in the construction of a bomb. (Tr. 732-735).

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[2] "Archambault" testified under an assumed name.

C. Conviction And Sentencing

On September 20, 2007, the jury convicted petitioner of all counts. He was sentenced to two concurrent life terms, two concurrent five year terms of supervised release, restitution in the amount of $979,100.80, and a $200.00 special assessment.

He is currently serving his sentence of imprisonment.

II. The Decision Of The United States Court Of Appeals For The Second Circuit

On December 30, 2008, the Second Circuit affirmed the judgment of conviction. *United States v. Vallee*, No. 08-1987, 2008 WL 5411079 (2d Cir. Dec. 30, 2008) (SUMMARY ORDER) (App. 1a). The Second Circuit determined that the admission of Carter's hearsay statements did not violate petitioner's Sixth Amendment right of confrontation, rejecting petitioner's argument that "after *Giles*, the forfeiture-by-wrongdoing doctrine ought to apply only in the proceeding from which it was the defendant's purpose to procure the witness's absence." *Id.* at 4. (App. 7a). The Second Circuit applied the precedent of *United States v. Stewart*, 485 F.3d 666, 672 (2d Cir. 2007) holding that "[a] defendant who wrongfully and intentionally renders a declarant unavailable as a witness in any proceeding forfeits the right to exclude . . . the declarant's statements at that proceeding *and any subsequent proceeding*." *Vallee*, No. 08-1987 2008 WL 5411079, at *4-5 (quoting *Stewart*) (emphasis in original)

(App. 7a). In a footnote, the Second Circuit acknowledged that the law in this area is unclear, and identified *Giles* as the basis for its decision:

> The Confrontation Clause "is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding." *Crawford v. Washington*, 541 U.S. 36, 54 (2004). It is unclear whether, at this country's founding, the forfeiture-by-wrongdoing exception applied to testimony initially collected for one proceeding but subsequently introduced at a second proceeding involving the same defendant but a different offense. *Compare Reynolds v. United States*, 98 U.S. 145, 158-59 (1878) (holding, under "long-established" principles dating back to English common law, that "if a witness is kept away by the adverse party, his testimony, taken on a former trial between the same parties upon the same issues, may be given in evidence"), *with* John Pitt Taylor, *A Treatise on the Law of Evidence as Administered in England and Ireland* 330 (9th ed. 1897) ("if a witness be *kept out of the way* by the adversary, his former statements on oath will be admissible"). Nonetheless, the Supreme Court's invitation in *Giles* to the state court to explore defendant's intent on remand, *Giles*, 128 S.Ct. at 2693, suggests that the exception applies to statements introduced at the declarant's murder trial, provided, at

> least, that the defendant intended to prevent the witness from testifying at an earlier proceeding.

Vallee, No. 08-1987, 2008 WL 5411079, at *5, fn 3 (SUMMARY ORDER) (App. 7a).

The Court of Appeals opinion invites further review by this Court.

REASONS FOR GRANTING THE PETITION

I. Petitioner's Case Is An Ideal Vehicle For Resolving The Questions Presented.

A. The Circumstances Of This Case Are Rare; Resolving This Issue Is Urgent; And The Court Below Relied on *Giles* And Acknowledged The Lack Of Clarity In This Area Of Law.

The forfeiture-by-wrongdoing rule was applied at common law to permit the introduction of the unconfronted statements of an absent witness "who was 'detained' or 'kept away' by the 'means or procurement' of the defendant." *Giles v. California*, 128 S.Ct. 2678, 2683 (2008) (*citing Lord Morley's Case*, 6 How. St. Tr. 769, 771 (H.L. 1666); *Harrison's Case*, 12 How St. Tr. 833, 851 (H.L. 1692); *Queen v. Scaife*, 117 Q.B. 238, 242 (K.B. 1851); 2 W. Hawkins, Pleas of the Crown 425 (4th ed. 1762); T. Peake, Compendium of the Law of Evidence 62 (2d ed. 1804); 1 G. Gilbert, Law of Evidence 214 (1791)). The forfeiture doctrine was typically

applied in one scenario: a defendant killed or otherwise made unavailable a prospective witness with the intent to prevent that witness from testifying at a trial, and forfeiture was imposed to allow the former statements of the absent witness to be admitted **in the proceeding in which the witness was expected to testify**. *United States v. Lentz*, 282 F.Supp.2d 399, 426 (E.D. Va. 2002). Such was the scenario in *Lord Morley's Case*, 6 How. St. Tr. 769 (H.L. 1666)—the English case in which the forfeiture rule is rooted. Such was the scenario in *Reynolds v. United States*, 98 U.S. 145 (1879)—the first case in which this Court held that a defendant's right to confrontation could be forfeited as a result of the party's misconduct. And the doctrine was applied solely in that scenario for over one-hundred years thereafter.

In the past twenty-five years, courts have expanded the rule. From 1980 to 2004, courts applied the constitutional standard established in *Ohio v. Roberts*, 448 U.S. 56 (1980), in evaluating Confrontation Clause claims. The *Roberts* test permitted a hearsay statement to be introduced so long as it bore sufficient "indicia of reliability." *Id.* at 66. The loose standard of *Roberts* provided flexibility in the use of hearsay. In conformity with that inclination to admit statements that fell within a hearsay exception, modern courts began to apply the forfeiture rule in a more expansive manner than previous courts. *See, e.g. United States v. Thevis*, 665 F.2d 616, 627-33 (5th Cir. 1982) (imposing forfeiture to admit prior testimony of victim when one

of the three charges against the defendant was the murder of that victim). Prior to *Thevis*, no Court of Appeals had applied the forfeiture doctrine reflexively, *i.e.* in a trial where the underlying wrongdoing that triggered the forfeiture, such as the killing of a prospective witness, is the same act for which the accused is charged.

In 1997, the forfeiture rule was codified in *Federal Rule of Evidence* 804(b)(6), which provides that the hearsay rule does not exclude "[a] statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness." The Rule and its accompanying Commentary furnish no clarification as to whether the requisite intent need apply to the specific proceeding in which the statements are introduced; or whether the exception applies to statements introduced at the proceeding in which the defendant intended to prevent the witness from testifying, *and any subsequent proceeding*.

In the *Roberts* era, in which flexibility in the use of hearsay statements was seemingly favored, most courts interpreted the rule broadly. Courts created an expanded formulation of the forfeiture doctrine, determining that the required intent need not attach to a particular proceeding. *See, e.g., United States v. Emery*, 186 F.3d 921, 926 (8th Cir. 1999) (rejecting defendant's argument that forfeiture applies only in the proceeding for "the underlying crimes about which he feared [the victim] would

testify, not in a trial for murdering her."); *United States v. Miller*, 116 F.3d 641 (2d Cir. 1997) (same).

During the *Roberts* era, the subjective reliability standard made unconfronted hearsay overly-admissible, while the courts' overly-broad interpretation of the forfeiture exception expanded the application of the common law doctrine beyond its original, case-specific use. Erosion of the vital protections of the Confrontation Clause ensued.

In *Crawford v. Washington*, 541 U.S. 36 (2004), this Court stepped in to reclaim the right to Confrontation. Recognizing that the *Roberts* standard "often fails to protect against paradigmatic confrontation violations," *Id.* 60, this Court reformulated the constitutional standard required by the Confrontation Clause, overruling the *Roberts* reliability test. Creating a new, more stringent standard, this Court held that testimonial hearsay statements are admissible against a defendant only if he or she had an opportunity to cross-examine the declarant. *Id.* at 53-54. Thus, in an attempt to rectify the injustices that result from leaving the protections of the Confrontation Clause "to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability'" *Id.* at 61, this Court substantially limited the government's ability to introduce a declarant's out-of-court statements against a criminal defendant.

As recognized by the *Crawford* Court, however, the Sixth Amendment right to confrontation is not absolute. The central holding of *Crawford* is that the Confrontation Clause is "most naturally read

as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding." *Id.* at 54. The *Crawford* Court acknowledged that two forms of unconfronted testimonial statements were admitted at common law: dying declarations and statements that fell within the forfeiture-by-wrongdoing doctrine. *Id.* at 56, n. 6, 62. As such, this Court endorsed the forfeiture rule as an exception to its new constitutional standard, but left open the scope of its application.

Further clarification was provided in *Giles v. California*, 128 S.Ct. 2678 (2008). With the more stringent *Crawford* standard now barring the admission of testimony which formerly may have been admissible under *Roberts*, the lower courts employed a broader interpretation of the *Crawford*-approved forfeiture rule which expanded the instances in which the government would be permitted to use unconfronted testimonial hearsay. *See, e.g. United States v. Garcia-Meza*, 403 F.3d 364, 370-371 (6th Cir. 2005) (holding that forfeiture of the right to Confrontation is "based on principles of equity" and does not "hinge on the wrongdoer's motive"); *People v. Bauder*, 712 N.W. 2d 506, 514 (Mich. Ct. App. 2005) (holding that intent to make the witness unavailable is not required for forfeiture of a defendant's Confrontation Clause right); *State v. Gonzales*, 155 S.W.3d 603 (Tex. Crim. App. 2004) (same); *People v. Giles*, 55 Cal. Reptr.3d 133 (Cal. 2007), *aff'g* 19 Cal. Reptr.3d 843 (Cal. Ct. App. 2004), *vacated*, 128

S.Ct. 2678. Again, this Court stepped in to preserve the Confrontation Clause's vital protections. This Court, in *Giles* imposed limits on the application of the forfeiture doctrine, rejecting the expansive rule created by the lower courts.

In *Giles*, this Court emphasized that historical interpretation of the Confrontation Clause demonstrates that the "wrong" that triggers the forfeiture-by-wrongdoing exception must be "conduct *designed* to prevent a witness from testifying." *Id.* at 2683 (emphasis in original). Accordingly, this Court held that the exception applies "only if the defendant has in mind the particular purpose of making the witness unavailable." *Id.* at 2687.

Since the issue of whether intent to prevent a witness from testifying is required at all was dispositive in *Giles*, once again no definitive answer was provided to the question of whether the "particular purpose," now mandated by this Court, need attach to the particular proceeding in which the hearsay statements are to be introduced. In deciding petitioner's case, the Second Circuit, with some reluctance, interpreted this Court's remand in *Giles* as standing for the general principle that the forfeiture doctrine is not case-specific, and thus may be applied in a subsequent trial for the murder of the witness.

Cases which have imposed forfeiture reflexively—to allow a victim's statements to be introduced against a defendant in the subsequent trial for the murder of that witness—are rare. Nevertheless, that is the scenario in petitioner's case.

The rare circumstances of petitioner's case are the first of several reasons why petitioner's case is an ideal vehicle for resolution of this issue. Another is that the Second Circuit relied on *Giles*. Even more telling is the way in which it did so: The Second Circuit endeavored to determine whether, "at this country's founding, the forfeiture-by-wrongdoing exception applied to testimony initially collected for one proceeding but subsequently introduced at a second proceeding involving the same defendant but a different offense." *Vallee*, No. 08-1987, 2008 WL 5411079, at *5, fn. 3 (SUMMARY ORDER) (App. 7a). Following *Crawford's* directive, the Second Circuit looked to cases and treatises quoting English common law. The Second Circuit's research was unavailing: The court determined that it is "unclear" whether the English common law rule applied in such a way. *Id.* Only after asserting its inability to ascertain whether this formulation of the forfeiture rule was an "exception[ ] established at the time of the founding," *Crawford*, 541 U.S. at 54, did the Court attempt to apply *Giles* to the facts of petitioner's case. So when the Second Circuit finally expressed its reliance on *Giles*, it did so with an air of uncertainty:

> Nonetheless, the Supreme Court's invitation in *Giles* to the state court to explore defendant's intent on remand, *Giles*, 128 S.Ct. at 2693, suggests that the exception applies to statements introduced at the declarant's murder trial, provided, at least, that the defendant intended to prevent the witness from testifying at an earlier proceeding.

Vallee, No. 08-1987, 2008 WL 5411079, at *5, fn. 3 (SUMMARY ORDER) (App. 7a).

The Second Circuit opinion subtly implores this Court to clarify the issue of whether the forfeiture exception is case-specific: The Second Circuit acknowledged the difficulty of interpreting the common law formulation of the forfeiture doctrine; noted the confusion surrounding this issue; and questioned whether *Giles* established that the forfeiture exception may be applied reflexively.

Additionally, timing makes petitioner's case optimal for resolving the questions presented. The importance of resolving this issue is evident in light of: (1) the rapid evolution of Confrontation Clause jurisprudence; (2) the present risk that more courts may misinterpret *Giles* as endorsing reflexive application of the forfeiture doctrine; and (3) the current widespread acceptance by the lower courts of a forfeiture exception which applies in a way that deviates so far from the common law application of the rule that it applies in circumstances which the founders could not have intended the exception to include, even if broadly construed.

B. Petitioner's Case Gives This Court An Opportunity To Distinguish Ordinary Cases From Cases Involving Domestic Abuse, Such As *Giles*.

The Second Circuit found that *Giles* stands for the proposition that the forfeiture exception is not case-specific and may be applied in a subsequent

trial for the witness' murder. Assuming *arguendo* the Second Circuit was correct, petitioner's case provides this Court with an opportunity to distinguish *Giles* from cases that do not involve domestic abuse.

Since *Crawford*, commentators have voiced the concern that the nature of domestic violence cases "requires greater flexibility in the use of testimonial evidence." *Davis v. Washington*, 547 U.S. 813, 832 (2006). In *Davis*, this Court recognized that crimes involving domestic violence are "notoriously susceptible to intimidation or coercion of the victim to ensure that she does not testify at trial." *Id.* at 833. In their *Giles* dissent, Justices Breyer, Stevens, and Kennedy acknowledged the unique difficulties associated with domestic violence prosecutions:

> The rule of forfeiture is implicated primarily where domestic abuse is at issue. In such a case, a murder victim may have previously given a testimonial statement, say, to the police, about an abuser's attacks; and introduction of that statement may be at issue in a later trial for the abuser's subsequent murder of the victim. This is not an uncommon occurrence. Each year, domestic violence results in more than 1,500 deaths and more than 2 million injuries; it accounts for a substantial portion of all homicides; it typically involves a history of repeated violence; and it is difficult to prove in court because the victim is generally reluctant or unable to testify. (internal citations omitted).

> Regardless of a defendant's purpose, threats, further violence, and ultimately murder, can stop victims from testifying. *See id.*, at 769 (citing finding that batterers threaten retaliatory violence in as many as half of all cases, and 30 percent of batterers assault their victims again during the prosecution). A *constitutional* evidentiary requirement that insists upon a showing of purpose (rather than simply intent or probabilistic knowledge) may permit the domestic partner who made the threats, caused the violence, or even murdered the victim to avoid conviction for earlier crimes by taking advantage of later ones.

Giles, 128 S.Ct. at 2708-2709 (Breyer, J., Stevens, J., and Kennedy, J., dissenting). Evidently, this Court is well-aware of the utility of the forfeiture-by-wrongdoing exception in domestic violence prosecutions. Due to the overwhelming occurrence of witness intimidation in domestic abuse cases, the utility of the forfeiture doctrine in such cases is exceptional.

Accordingly, since *Giles* involved domestic abuse, and since this Court's decision was likely to have a direct impact on future domestic violence prosecutions, it was inevitable that the outer bounds of forfeiture would be promulgated in *Giles*. That is not to say, however, that such an abridgement of the right to confrontation is justified in all cases. The prevalence of witness intimidation in domestic violence cases may warrant a more expansive applica-

tion of the forfeiture exception even though the doctrine was not applied in that manner at common law—perhaps because domestic violence was seldom treated as a crime historically. In contrast, there is no excuse for the absence from the historical record of any case applying forfeiture to admit the statements of an unavailable witness in the very trial for the murder of that witness. Furthermore, defendants in domestic violence cases stand to "avoid conviction for earlier crimes" because those earlier crimes were unreported by the fearful victim. Whereas, outside the context of domestic abuse, defendants like petitioner, who allegedly murdered a potential witness to prevent the witness from testifying in some prior case, do not escape conviction for the earlier crime. It is beyond cavil that the forfeiture-by-wrongdoing exception applies at the earlier proceeding to prevent the defendant from benefiting from his crime. Thus, the application of the forfeiture exception at the subsequent trial for the witness' murder is not justified in the way that it would be in the domestic violence context.

There are significant differences between domestic violence cases, like *Giles*, and those not involving domestic abuse, like petitioner's case. This Court has never treated constitutional rights as absolute. Instead, this Court balances the values of the right to confrontation against the necessity of maintaining the integrity of the judicial process. Striking a proper balance requires that this Court draw a distinction between domestic violence cases

and all other cases. While the extraordinarily high incidence of witness tampering in domestic violence cases may tip the scale in favor of constricting a defendant's right to confront the witnesses against him, constitutional rights would be unreasonably vitiated if the forfeiture exception was broadened in all cases.

As such, if *Giles* stands for the proposition that the forfeiture doctrine may be applied reflexively, this Court should distinguish domestic violence prosecutions—in which the outer limits of the forfeiture doctrine are established—from all other cases—in which reflexive application of the forfeiture doctrine is inappropriate and unconstitutional. Petitioner's case gives this Court an opportunity to do so.

II. Reflexive Application Of The Forfeiture Doctrine Is Not Supported By This Court's Cases On The Confrontation Clause Or The Rule Of Forfeiture-By-Wrongdoing Applied At Common Law And Adopted In *Reynolds*.

A. Reflexive Application Of The Forfeiture-By-Wrongdoing Exception Violates *Crawford's* Mandate That The Right To Confrontation, And Any Exception To It, Must Be Grounded In The Law As It Existed At The Time The Sixth Amendment Was Adopted.

In *Crawford v. Washington*, 541 U.S. 36, 50 (2004), this Court emphasized that the Sixth Amendment must be interpreted with a focus on the historical underpinnings of the Confrontation Clause. This Court declared that "the Sixth Amendment demands what the common law required," and any exceptions to the right of confrontation are to be found in the historical record. *Id.* at 68. *Crawford* teaches that exceptions to the Confrontation Clause are extraordinarily limited.

> The text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts. Rather, the "right . . . to be confronted with the witnesses against him," Amdt. 6, is most naturally read as a reference to the right of confrontation at common

> law, admitting only those exceptions established at the time of the founding.

Id. at 54.

The *Crawford* Court adopted the forfeiture-by-wrongdoing exception in a parenthetical without any discussion of the scope of the doctrine, its appropriate application at common law, or illustrative cases that imposed forfeiture: "[T]he rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds; it does not purport to be an alternative means of determining reliability." *Id.* at 62 (*citing Reynolds v. United States*, 98 U.S. 145, 158-159 (1879)). It appears the Court addressed the forfeiture rule merely to distinguish the doctrine's equitable rationale from the "indicia of reliability" standard of *Ohio v. Roberts*, 448 U.S. 56 (1980), which the Court found to be incompatible with the common law history of the Confrontation Clause.

The *Crawford* opinion offered a starting point for unearthing the founding-era formulation of the forfeiture-by-wrongdoing doctrine: It approvingly cited *Reynolds*—the first case in which this Court recognized that a defendant's Sixth Amendment right to confrontation could be forfeited due to the party's own misconduct. In *Reynolds*, this Court affirmed the defendant's bigamy conviction, rejecting the defendant's claim that the trial court's admission of the testimony of his second wife violated his Sixth Amendment confrontation rights.

The testimony of the absent second wife was admitted at Reynolds' bigamy trial because prior to that trial an officer twice attempted to serve a subpoena on the second wife, but was prevented from doing so because Reynolds and his first wife falsely represented that the second wife was not present. This Court held that Reynolds had forfeited his Confrontation Clause claim, explaining: "[I]f a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away." *Reynolds*, 98 U.S. at 158.

As authority for this ruling, this Court cited English common law precedents, including *Lord Morley's Case* and *Harrison's Case*, in addition to early American case law and treatises. *Reynolds* elucidates the history of the forfeiture-by-wrongdoing doctrine and the common law formulation of the rule:

> This resolution [in *Lord Morley's Case*] was followed in *Harrison's Case* (12 id. 851), and seems to have been recognized as the law in England ever since. In *Regina v. Scaife* (17 Ad. & El. N. S. 242), all the judges agreed that if the prisoner had resorted to a contrivance to keep a witness out of the way, the deposition of the witness, taken before a magistrate and in the presence of the prisoner, might be read. Other cases to the same effect are to be found, and in this country the ruling has been in the same way. *Drayton v. Wells*, 1 Nott & M. (S. C.) 409; *Williams v.*

> *The State*, 19 Ga. 403. So that now, in the leading text-books, it is laid down that if a witness is kept away by the adverse party, his testimony, taken on a former trial between the same parties *upon the same issues*, may be given in evidence. 1 Greenl. Evid., sect. 163; 1 Taylor, Evid., sect. 446.

Reynolds, 98 U.S. at 158-159 (emphasis added).

None of the cases cited by this Court in *Reynolds*—*Lord Morley's Case*, *Harrison's Case*, *Regina*, *Drayton*, and *Williams*—involved application of the forfeiture doctrine in any proceeding other than *that particular proceeding* in which the defendant intended to prevent the witness from testifying. And none of those cases stand for the proposition that a defendant who procures the unavailability of a witness with the intent to prevent the witness from testifying forfeits his or her right to confront the witness in *all proceedings* in which the witness' statements are otherwise admissible. The absence of common law cases to that effect suggests that the common law forfeiture-by-wrongdoing doctrine was case-specific. Additionally, the requirement that the trial in which forfeiture is imposed must be "between the same parties" and "upon the same issues" as the trial in which the testimony was given suggests that the scope of the forfeiture doctrine (as it existed at common law) precluded application of the rule in the subsequent trial for the witness' murder.

Nor do the treatises referenced in *Reynolds* support reflexive application of the forfeiture-by-wrongdoing doctrine. The language employed in those treatises in "laying down" the rule is broad enough to cover a large spectrum of cases, including proceedings like petitioner's—the subsequent trial for the witness' murder. Nevertheless, the cases cited in those treatises as authority for the acknowledged rule are revealing. None of those cases involves application of the forfeiture doctrine in any proceeding other than that in which the defendant intended to prevent the witness from testifying.

In fact, all of the English and early American cases that imposed forfeiture admitted the absent witness' statements only in the specific proceeding at which the defendant intended to prevent the witness from testifying. The historic record is completely void of any basis for the expansive forfeiture rule recently espoused by the lower courts. As acknowledged by Justice Scalia himself during the *Giles* oral argument, not a single common law case applied the forfeiture-by-wrongdoing doctrine reflexively:

> JUSTICE SCALIA: I had thought that the common law rule is that you have to have rendered the witness—intentionally rendered the witness unavailable with regard to the particular trial that's before the court. Not rendering the witness available for some other litigation.

. . .

JUSTICE SCALIA: Do you know of any case where it was some other litigation that –

MS. BURKHARDT: No.

JUSTICE SCALIA: I didn't think so.

Giles, Oral Arg. Tr. at 20. Therefore, the forfeiture doctrine adopted by this Court in *Reynolds* in 1879 and reaffirmed in *Crawford* was derived from over two hundred years of case law that consistently applied the rule only in the proceeding at which the witness was expected by the defendant to testify.

Thus, when this Court first adopted the forfeiture-by-wrongdoing exception to the Confrontation Clause in 1879, it could not possibly have meant this expansive rule that the federal courts have created, because such did not exist at that time. And since the expansive forfeiture rule—"that '[a] defendant who wrongfully and intentionally renders a declarant unavailable as a witness in any proceeding forfeits the right to exclude . . . the declarant's statements at that proceeding *and any subsequent proceeding*'"—did not yet exist in 1879, it certainly was not a founding-era exception. As such, reflexive application of the forfeiture doctrine violates *Crawford's* mandate that any exception to the right to confrontation must have been established when the Sixth Amendment was adopted.

Consistent with its ruling in *Crawford*, this Court held in *Giles*, "[w]e decline to approve an exception to the Confrontation Clause unheard of

at the time of the founding or for 200 years thereafter." *Giles*, 128 S. Ct. at 2693. That precedent applies equally to petitioner's case. Approving an exception to the Confrontation Clause which did not exist at the time of the founding opens the door to unfettered diminution of the Constitution's most vital protections.

B. Reflexive Application Of The Forfeiture Doctrine Is Not Supported By This Court's Modern Confrontation Clause Jurisprudence.

In recent years this Court has granted review to safeguard the Sixth Amendment right to confrontation and to clarify the bounds of its exceptions. *Crawford* and *Giles* are two such examples. When reviewing this Court's modern Confrontation Clause jurisprudence, a common theme reverberates: limiting the government's ability to introduce unconfronted testimonial hearsay against a criminal defendant. To allow courts to apply the forfeiture-by-wrongdoing doctrine reflexively would be reversing course and would imperil vital constitutional protections. This Court's recent Confrontation Clause jurisprudence makes clear that an overly broad interpretation of the forfeiture rule emasculates the right to confrontation and the recognized exceptions to it, and vitiates the rationale behind application of the doctrine.

In *Giles*, this Court crafted a "particular purpose" super-intent requirement in order to narrowly restrict application of the forfeiture exception.

Giles builds upon this Court's previous precedent emphasizing that invocation of forfeiture-by-wrongdoing is only proper "when defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims[.]" *Davis*, 547 U.S. 813, 833 (2006) (emphasis added). This Court's language explicitly indicates that a defendant must "seek" or intend to produce a witness' silence with regard to a "judicial process" in order to forfeit the constitutional right to confrontation. *Id.* However, one cannot intend to undermine a "process" that has not been conceptualized, conceived, or initiated. Thus, while invocation of the forfeiture doctrine would be proper in the case in which the absent witness was expected to testify--the "process" which the defendant sought to undermine—application of the forfeiture doctrine is improper in the subsequent trial for that witness' murder. It is beyond logic to suggest that a defendant murdered the victim in order to undermine his future prosecution for murder. The only sensible rule is a case-specific forfeiture-by-wrongdoing exception.

Giles also casts light on the dangers of applying the forfeiture exception reflexively. Justices Souter and Ginsburg, concurring, emphasized the importance of "intent" in the forfeiture-by-wrongdoing doctrine by alluding to precisely the situation confronted in petitioner's case:

> It was, and is, reasonable to place the risk of untruth in an unconfronted, out-of-court statement on a defendant who meant to pre-

> clude the testing that confrontation provides. The importance of that intent in assessing the fairness of placing the risk on the defendant is most obvious when a defendant is prosecuted for the very act that causes the witness's absence, homicide being the extreme example.

Giles, 128 S.Ct. at 2694 (Souter, J. and Ginsburg, J., concurring in part). Justices Souter and Ginsburg went on to highlight the extraordinary danger in the circular logic inherent in applying the forfeiture doctrine where, as in petitioner's case, the underlying offense is the act that rendered the witness unavailable:

> If the victim's prior statement were admissible solely because the defendant kept the witness out of court by committing homicide, admissibility of the victim's statement to prove guilt would turn on finding the defendant guilty of the homicidal act causing the absence; evidence that the defendant killed would come in because the defendant probably killed. The only thing saving admissibility and liability determinations from question begging would be (in a jury case) the distinct functions of the judge and jury: judges would find by a preponderance of evidence that the defendant killed (and so would admit the testimonial statement), while the jury could so find only on proof beyond a reasonable doubt. *Equity demands something more than this near circularity before the right to confronta-*

> *tion is forfeited, and more is supplied by showing intent to prevent the witness from testifying.*

Id. (emphasis added).

The reasoning in *Giles* is particularly powerful when considered in the context of petitioner's case, which is the "extreme example." The "reasonable[ness]" and "fairness" of imposing forfeiture are missing in the subsequent trial for the witness' murder because, again, the defendant did not "mean[ ] to preclude the testing that confrontation provides" at that murder trial. The defendant certainly never expected the victim to be a witness at his or her own murder trial. In essence, the equitable force for concluding that the defendant has forfeited the right to confrontation is missing in such a case.

Justices Souter and Ginsburg were not alone in the belief that the forfeiture doctrine should be limited in order to protect some of the fundamental precepts of our judicial system. The *Giles* majority also emphasized its deep discomfort with, and rejection of, "[t]he notion that judges may strip the defendant of a right that the Constitution deems essential to a fair trial, on the basis of a prior *judicial* assessment that the defendant is guilty as charged, [this notion] does not sit well with the right to trial by jury. It is akin, one might say, to 'dispensing with jury trial because a defendant is obviously guilty.'" *Id.* at 2686 (*citing Crawford*, 541 U.S. at 62) (emphasis in original).

Then, prompted by the dissent to consider the "basic purposes and objectives" of the forfeiture doctrine, the majority expounded:

> The common-law forfeiture rule was aimed at removing the otherwise powerful incentive for defendants to intimidate, bribe, and kill the witnesses against them—in other words, it is grounded in "the ability of courts to protect the integrity of their proceedings." *Davis*, 547 U.S., at 834 [ ]. The boundaries of the doctrine seem to us intelligently fixed so as to avoid a principle repugnant to our constitutional system of trial by jury: that those murder defendants whom the judge considers guilty (after less than a full trial, mind you, and of course before the jury has pronounced guilt) should be deprived of fair-trial rights, lest they benefit from their judge-determined wrong.

Id. at 2691. As this Court recognized, application of the forfeiture rule in the proceeding at which the witness was expected to testify removes the "otherwise powerful incentive" for defendants to procure the absence of the witness. To extend the forfeiture doctrine to include subsequent prosecutions for murder is to extend the narrow doctrine to the point of breaking the back of the Constitution.

For the Court to reverse course at this point and allow the forfeiture exception to be applied reflexively would require two drastic measures: (i) a significant reformulation of the rationale and purpose of the forfeiture-by-wrongdoing doctrine; and

(ii) rejection of the deep-rooted historical record that admitted the statements of an absent witness only in the particular proceeding in which the defendant intended to prevent the witness from testifying.

III. The Intended Purpose Of The Forfeiture-By-Wrongdoing Doctrine Is Ill-Served By The Forfeiture Of A Defendant's Confrontation Clause Claims In A Subsequent Trial For The Witness' Murder.

The intended purpose of the forfeiture-by-wrongdoing doctrine is gleaned from its foundation. The forfeiture-by-wrongdoing doctrine was created as a prophylactic rule upon the maxim that "no one shall be permitted to take advantage of his own wrong." *Reynolds*, 98 U.S. at 159. Based in principles of equity, when properly administered the forfeiture exception to the Confrontation Clause is justified because it prevents a defendant from enjoying a privilege wrongfully obtained. Consequently, it deters such wrongdoings by removing the incentive for committing the wrong.

In the context of the doctrine's application at common law, that purpose was well served by the rule. For example, in both *Lord Morley's Case* and *Reynolds*, the common law forfeiture rule was appropriately applied in the proceeding from which it was the defendant's purpose to procure the witness' absence. In such a trial, defendant stands to benefit from his wrongdoing. Unlike other defendants who have not procured the unavailability of

a witness, defendant would have the statements of that witness excluded because their admission would violate defendant's right to confrontation. Thus, application of the equitable forfeiture exception was necessarily applied in such a trial to prevent a defendant from gaining those wrongfully acquired benefits.

Over time, however, the forfeiture doctrine evolved. While courts continue to articulate the tenet set forth in *Reynolds* as the basis for imposing forfeiture, the modern expansive application of the rule strays far from the historic application which was justified by the purpose it served. The equitable forfeiture rule was historically applied for the purpose of preventing a defendant from profiting from his wrong. In recent times, courts have applied the doctrine even in cases where the defendant stood to receive no benefit from his wrongdoing.

Namely, courts have imposed forfeiture not just in the particular trial for which the defendant intended to procure the witness' absence, but also in the subsequent trial for that witness' murder. Defendant receives no benefit from his wrongdoing in such a case; at least no benefit other than those afforded any defendant in any murder trial. In both the case of the defendant who murdered the victim to prevent him from testifying in another trial, and the case of the defendant who murdered the victim merely for the purpose of killing him, the victim is dead (and thus unavailable). As such, in both instances the defendant benefits from the victim's

death because the deceased victim's testimonial statements are inadmissible at trial. But that is what the Confrontation Clause was designed to achieve. It was designed to provide defendants a fair trial. In that sense, all defendants profit from the Confrontation Clause.

Nevertheless, in the absence of a holding that the forfeiture-by-wrongdoing exception applies *in all murder cases* to allow the victim's statements to be admitted at trial—a holding which appears unlikely in light of *Giles*, establishing a super-intent requirement—application of the forfeiture rule in the subsequent trial for a witness' murder can not be rationalized by the oft recited maxim that a person should not benefit from his wrongs. Defendant gains no advantage over other murder trial defendants, and thus the deprivation of his fundamental right to confront the witnesses against him in such a case is both unjustified and unjustifiable.

IV. The Widespread Acceptance By The Lower Courts Of A Forfeiture Exception Which Was Non-Existent At The Founding Of The Confrontation Clause And Which Is Unsupported By The Basic Purposes And Objectives Of The Forfeiture Doctrine Necessitates This Court's Intervention.

Six circuits have addressed the issue of whether the forfeiture-by-wrongdoing doctrine is case specific or whether the doctrine is applicable to a missing witness' statements even in a subsequent trial for murdering that witness. All six circuits applied

the rule reflexively. *See United States v. Houlihan*, 92 F.3d 1271, 1278-81 (1st Cir. 1996); *United States v. Dhinsa*, 243 F.3d 635, 652-53 (2d Cir. 2001); *United States v. Gray*, 405 F.3d 227, 241 (4th Cir. 2005); *United States v. Thevis*, 665 F.2d 616, 627-33 (5th Cir. 1982); *United States v. Emery*, 186 F.3d 921, 926 (8th Cir. 1999); *Hodges v. Attorney General, State of Florida*, 506 F.3d 1337 (11th Cir. 2007). But six wrong decisions do not amount to one right decision. The fact that there is congruence amongst circuits does not make those holdings correct, it merely necessitates this Court's intervention.

State courts have followed the lead of the Courts of Appeals, and have held that the forfeiture-by-wrongdoing exception applies not just in the specific case where the unavailable declarant was expected to testify, but in all subsequent proceedings in which the declarant's statements are otherwise admissible. *See, e.g. Vasquez v. People*, 173 P.3d 1099 (Colo. 2007), citing federal cases as authority for its ruling:

> Until now, no state jurisdiction employing the intent requirement has addressed a fact scenario in which a defendant had the requisite intent to work a forfeiture in one proceeding, then subsequently benefited (perhaps unwittingly) from the witness's unavailability in additional proceedings. However, federal courts, in construing *Rule 804(b)(6) of the Federal Rules of Evidence*, have explicitly provided that the defendant's

> intent need not attach to any particular proceeding. Although Colorado has not enacted a hearsay exception akin to Rule 804(b)(6), we have looked to the federal rule to clarify the contours of the forfeiture doctrine.

Id. at 1104 (internal citations omitted). This trend has resulted in the reflexive application of the forfeiture exception in an overwhelming majority of courts, stripping countless defendants of the fundamental right to confrontation. *See, e.g., United States v. Dhinsa*, 243 F.3d 635 (2d Cir. 2001) (applying forfeiture reflexively in a murder trial); *United States v. Emery*, 186 F.3d 921, 926 (8th Cir. 1999) (rejecting the defendant's objection that forfeiture should only apply for "the underlying crimes about which he feared [his victim] would testify, not in a trial for murdering her."); *United States v. Miller*, 116 F.3d 641 (2d Cir. 1997) (same); *United States v. Houlihan*, 92 F.3d 1271, 1278-81 (1st Cir. 1996) (same); *United States v. Rouco*, 765 F.2d 983, 993-95 (11th Cir. 1985) (finding that forfeiture applied reflexively in a defendant's murder case); *United States v. Thevis*, 665 F.2d 616, 627-33 (5th Cir. 1982) (admitting murder victim's prior testimony when one of the three charges against the defendant was the murder of that victim); *State v. Mason*, 162 P.3d 396 (Wash. 2007); *United States v. Lentz*, 524 F.3d 501 (4th Cir. 2008); *United States v. Johnson*, 495 F.3d 951 (8th Cir. 2007); *Hodges v. Attorney General, State of Florida*, 506 F.3d 1337 (11th Cir. 2007); *United States v. Stewart*, 485 F.3d 666, 672 (2d Cir. 2007) (holding "[a]

defendant who wrongfully and intentionally renders a declarant unavailable as a witness in any proceeding forfeits the right to exclude . . . the declarant's statements at that proceeding and any subsequent proceeding") (internal quotation marks omitted); *State v. Jensen*, 727 N.W.2d 518, 521 (Wis. 2007); *United States v. Stewart*, 485 F.3d 666, 672 (2d Cir. 2007).

The courts have created a new rule which expands the applicability of the common-law doctrine beyond its original use in the specific case in which the defendant intended to prevent the witness from testifying. The new rule, which applies in the proceeding in which the defendant intended to procure the witness' absence *and any subsequent proceeding*, has had the effect of watering down the protections promised by the Sixth Amendment. The circuit courts have done exactly what this Court forbade in *Crawford*: they created an exception to the Confrontation Clause which was non-existent at the ratification of the Sixth Amendment, and for almost 200 years thereafter. Given the importance of this issue and the rapid evolution of Confrontation Clause jurisprudence, it is once again time for this Court to intervene to clarify the metes and bounds of the forfeiture exception.

V. The History Is Uncertain, And The Issue Of Whether The Common Law Forfeiture Doctrine Even Applied To Admit Unconfronted Statements Is A Subject Of Debate, Even Among The Justices Of This Court. All The More Reason Not To Limit A Defendant's Sixth Amendment Rights By Further Expanding This Court-Created Exception.

In *Giles*, one topic debated by the dissent and majority was whether the forfeiture doctrine applied at common law to admit prior confronted statements only, or whether courts that imposed forfeiture admitted the statements of the absent witness without regard to whether they were confronted. Delving into English common law, Justices Breyer, Stevens and Kennedy, dissenting, argued:

> Historical authorities also tell us that a Marian statement could not be admitted unless it was a *proper* Marian deposition, meaning that the statement was given in the presence of the defendant thereby providing an opportunity to cross-examine the witness.

Giles, 128 S.Ct. at 2702 (Breyer, J., Stevens, J., and Kennedy, J., dissenting) (emphasis in original). The dissent goes on to explain that Marian depositions were admitted under the forfeiture doctrine not merely on the basis that the defendant had committed a wrong, but because they were sworn statements and the witness was unavailable. In fact, Marian depositions were admissible even in the absence of witness tampering by the defendant.

> (Where a witness was "dead," "unable to travel," or "kept away by the means or procurement of the prisoner" depositions could be read but they "must have been taken in the presence of the prisoner, *so that he might have had an opportunity of cross examining the witness*"[ ])

Id. (internal citations omitted).

The majority offers some historical evidence in support of its contention that the forfeiture doctrine applied to admit unconfronted testimony as well as confronted testimony. Yet, the historical record contains overwhelming support for the dissent's position. *See* 1 JOHN PITT TAYLOR, A TREATISE ON THE LAW OF EVIDENCE §§ 478, 486 (7th ed. 1878)[3]; 1 SIMON GREENLEAF, A TREATISE ON THE LAW

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[3] Taylor's treatise provides that the deposition of an absent witness "may be read in evidence against the man who had kept him out of the way." 1 TAYLOR § 478. However:

> Whether a deposition originally written down in the absence of the prisoner could be received in evidence . . . on proof being given that it had afterwards been read over in his presence to the witness, who had then assented on oath to its contents, is a very problematical question; for although depositions, thus laxly taken, have more than once been admitted under the old law, this course of proceeding has frequently been condemned by the judges as highly unjust; and, indeed, it is obvious that it affords no fair opportunity to the accused of cross-examining the deponent.

Id. at § 486. An unspecified edition of this treatise was approvingly cited by this Court in *Reynolds*.

OF EVIDENCE § 164 (15th ed. 1892)[4]. *See also* cases and treatises cited in the *Giles* dissent, 128 S.Ct. at 2702-2706. At the very least, the record suggests that the forfeiture rule known to the Framers admitted cross-examined testimony only. For example, in *Drayton v. Wells*, 1 Nott & McC. 409 (S.C. 1819), a case cited approvingly by this Court in *Reynolds*, the Court found:

> The books enumerate four cases only, in which the testimony of a witness who has been examined in a former trial, between the same parties, and where the point in issue was the same, may be given in evidence, on a second trial, from the mouths of other witnesses, who heard him give evidence:
>
> 1st. Where the witness was dead.
> 2nd. Where he was insane.
> 3rd. Where he was beyond seas; and

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[4] .With regard to statements received as a result of the witness having been "kept away," and other testimony discussed in § 163 of the treatise, Greenleaf's treatise provides:

> The principle on which, chiefly, this evidence is admitted, namely, the right of cross-examination, requires that its admission be carefully restricted to the extent of that right; and that where the witness incidentally stated matter, as to which the party was not permitted by the law of trials to cross-examine him, his statement as to that matter ought not afterwards to be received in evidence against such party.

1 GREENLEAF § 164.

> 4th. Where the Court was satisfied that the witness had been kept away by the contrivance of the opposite party.

Id. at *1-2. The Court then explained the foundation of the rule and expressed its deep concern about expanding the rule:

> It must be admitted, that in receiving this testimony in these cases, the Courts have gone very far. I think quite as far as they ought to go. But in all of them, the ground of the admissibility of the testimony, was the absence of the witness from death or inability to be present . . . [T]he general foundation of the rule, is the personal absence of the witness . . . It is said that this testimony, in the enumerated cases, is admitted *ex necessitate* . . . What is the necessity? That the party should have the benefit of the testimony. Now this necessity would equally exist in cases where witnesses had never been examined, and who were dead, or unavoidably absent. But it would be utterly unsafe to receive their declarations, without oath, and without cross examination. It is not then necessity, but expediency, which is the foundation of the rule. It has been deemed expedient to go as far as the cases already enumerated; but would it be wise to go further? . . . I think not.

Id. at *2. This case, decided only 28 years after the adoption of the Sixth Amendment, suggests that it was the reliable nature of the sworn, cross-exam-

ined statements and the unavailability of the witness that justified introducing such testimony. Not only does this case reveal that such testimony would not be admissible absent a prior opportunity for cross-examination; it warns against expanding the rule to allow the admission of unconfronted testimony.

Despite the position of the common law courts, this Court expanded the doctrine far beyond its common law formulation by applying it to admit both sworn and unsworn statements. Further, this Court dismissed the cross-examination requirement, making the forfeiture doctrine an exception to the very right to confrontation, despite the lack of any clear evidence that the forfeiture doctrine applied historically to anything other than previously cross-examined testimony.

The only thing that is clear is that the history is unclear. The whole judicial framework on which the forfeiture jurisprudence is based has been poorly cobbled-together by this Court. To stretch the doctrine any further, and approve it under the rubric of a founding-era exception, would be to ignore the historical record and to validate a court-created, modern-era exception which emasculates the Confrontation Clause's core protections.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that this Court grant the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX

MANDATE

08-1987	No. 96-cr-284
United States of America	N.D.N.Y. - ALNY
v. Richard Vallee	McAvoy, J.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT HTTP://WWW.CA2.USCOURTS.GOV/), THE PARTY CITING A SUMMARY ORDER MUST FILE AND SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED. IF NO COPY IS

SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the thirtieth day of December, two thousand and eight.

PRESENT: HON. SONIA SOTOMAYOR,
HON. ROBERT A. KATZMANN,
Circuit Judges,

HON. P. KEVIN CASTEL,
District Judge.[1]

08-1987-cr
[Oval Stamp:
United States Court of Appeals
Second Circuit
Filed: DEC 30, 2008
Catherine O'Hagan Wolfe, Clerk]

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[1] The Honorable P. Kevin Castel, of the United States District Court of the Southern District of New York, sitting by designation.

UNITED STATES OF AMERICA,

Appellee,

v.

RICHARD VALLEE, also known as "Rick,"

Defendant-Appellant.

[Stamp: ISSUED AS MANDATE 1/29/09]

For Appellant:

RONALD L. KUBY (David Pressman, George Wachtel *on the brief*), Law Office of Ronald L. Kuby, New York, New York.

For Appellee:

WILLIAM C. PERICAK, Assistant United States Attorney (Brenda K. Sannes, Assistant United States Attorney *on the brief*), *for* Andrew T. Baxter, Acting United States Attorney, United States Attorney's Office for the Northern District of New York, Albany, New York.

Appeal from the United States District Court for the Northern District of New York (Thomas J. McAvoy, *Judge*).

UPON DUE CONSIDERATION, it is hereby ORDERED, ADJUDGED AND DECREED that the judgment of the district court is AFFIRMED.

Richard Vallee appeals from his conviction, following a jury trial, of using an explosive to destroy a vehicle used in interstate commerce, 18 U.S.C. § 844(i), and murdering Lee Carter to prevent communication of information to a federal law enforcement officer, 18 U.S.C. § 1512(a)(1)(C). On April 14, 2008, the district court sentenced Vallee to life imprisonment on each count. We assume the parties' familiarity with the facts and the record of prior proceedings, which we reference only as necessary to explain our decision.

1. The Canadian prosecutor's testimony

Vallee challenges as irrelevant and unduly prejudicial the admission of testimony by a Canadian prosecutor that she told Vallee's trial counsel that Carter was the sole witness against Vallee in a Canadian drug prosecution. The testimony was offered to prove Vallee's motive to murder Carter. We review a trial court's evidentiary rulings under a deferential abuse of discretion standard, reversing only when we conclude that the challenged evidentiary rulings were arbitrary and irrational. *See United States v. Quinones*, 511 F.3d 289, 307-08 (2d Cir. 2007). We find no abuse of discretion.

First, the testimony at issue was not hearsay because it was not admitted for the truth of the matter asserted, but rather as evidence of Vallee's state of mind. Fed. R. Evid. 801(c).

Second, the evidence was relevant because it had a tendency to make the existence of a fact—whether Vallee knew that Carter was an important

witness against him—"more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. We have explained that "evidence regarding the knowledge of individuals other than the defendant should be admitted only if there is some other evidence in the record—concerning, for example, . . . the relationship of the parties—from which to conclude that the defendant would have the same knowledge." *United States v. Kaplan*, 490 F.3d 110, 120 (2d Cir. 2007). Here, there was evidence of a relationship which would permit the jury to infer the transmittal of the information: the attorney-client relationship of Vallee and his trial counsel. Moreover, Vallee admitted to Canadian law enforcement officials: "you know what happened to Carter, I blew him up; he didn't come to testify; and the other two won't come to testify either." Vallee's admission to killing Carter is evidence that would permit the jury to infer that Vallee knew Carter was an important witness against him, and that he acquired such knowledge from his counsel. *See* Fed. R. Evid. 104(b).

Finally, the district court also did not abuse its discretion in declining to exclude this testimony on the ground that its probative value was substantially outweighed by the danger of unfair prejudice. Fed. R. Evid. 403. Unfair prejudice "does not mean the damage to the opponent's case that results from the legitimate probative force of the evidence; rather, it refers to the unfair advantage that results from the capacity of the evidence to persuade by illegitimate means." 22 C. Wright & K. Graham, *Federal Practice and Procedure* § 5215

at 274-75 (1978). Although the Canadian prosecutor's testimony was damaging to Vallee's defense insofar as it suggested a motive for the alleged crimes, its probative value depended upon a reasonable inference regarding attorney-client communications, instead of upon an "illegitimate emotional appeal." *Id.* (internal quotation marks omitted).

2. Carter's out-of-court statements

Vallee argues that the admission of Carter's identification of him, as well as the admission of Carter's notes of a meeting with Vallee in Quebec, violated Vallee's rights under the Confrontation Clause.[2] U.S. CONST. amend. VI. The evidence was admitted under the forfeiture-by-wrongdoing exception to the hearsay rule and Confrontation Clause upon a finding that the prosecution had proved by a preponderance of the evidence that Vallee intentionally killed Carter to prevent him from testifying in the Canadian prosecution. *See* Fed. R. Evid. 804(b)(6). In *Giles v. California*, ___ U.S. ___, 128 S.Ct. 2678 (2008), the Supreme Court held that the forfeiture-by-wrongdoing doctrine applies "only when the defendant engaged in conduct *designed* to prevent the witness from testifying." *Id.* at 2683 (emphasis in original). This Circuit's precedent at the time of trial was not to the contrary. *See United States v. Dhinsa*, 243 F.3d 635, 653-54 (2d Cir. 2001).

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[2] We assume, without deciding, that these statements were "testimonial" and not admissible for any non-hearsay purpose.

Vallee argues that after *Giles*, the forfeiture-by-wrongdoing doctrine ought to apply only in the proceeding from which it was the defendant's purpose to procure the witness's absence. Vallee urges this Court to overrule our cases which hold that "[a] defendant who wrongfully and intentionally renders a declarant unavailable as a witness in any proceeding forfeits the right to exclude . . . the declarant's statements at that proceeding *and any subsequent proceeding*." *United States v. Stewart*, 485 F.3d 666, 672 (2d Cir. 2007) (internal quotation marks omitted) (emphasis added). *Giles* does not cast doubt on this controlling precedent and therefore we decline to overrule it.[3]

[3] The Confrontation Clause "is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding." *Crawford v. Washington*, 541 U.S. 36, 54 (2004). It is unclear whether, at this country's founding, the forfeiture-by-wrongdoing exception applied to testimony initially collected for one proceeding but subsequently introduced at a second proceeding involving the same defendant but a different offense." *Compare Reynolds v. United States*, 98 U.S. 145, 158-59 (1878) (holding, under "long-established" principles dating back to English common law, that "if a witness is kept away by the adverse party, his testimony, taken on a former trial between the same parties upon the same issues, may be given in evidence"), *with* John Pitt Taylor, *A Treatise on the Law of Evidence as Administered in England and Ireland* 330 (9th ed. 1897) ("if a witness be *kept out of the way* by the adversary, his former statements on oath will be admissible"). Nonetheless, the Supreme Court's invitation in *Giles* to the state court to explore defendant's intent on remand, *Giles*, 128 S.Ct. at 2693, suggests that the exception applies to statements introduced at the declarant's murder trial, provided, at least, that the defendant intended to prevent the witness from testifying at an earlier proceeding.

See Consub Delaware LLC v. Schahin Engenharia Limitada, 543 F.3d 104, 109 (2d Cir. 2008). Thus, because the district court found by a preponderance of the evidence that Vallee intended to, and did, procure Carter's absence as a witness in the Canadian prosecution, the court did not err in admitting Carter's out-of-court statements against Vallee in his subsequent prosecution for the murder of Carter.

3. The Canadian law enforcement officials' testimony

At trial, Agent Trudel testified that Vallee admitted to killing Carter during an interrogation by Agents Trudel and Morin in Canada:

> I began by introducing myself, and Mr. Morin did the same thing. . . . I informed [Vallee] that he was under arrest for the murder of Lee Carter, that he had the right to be silent; that he could contact a lawyer. He replied that he had just spoken to a lawyer. I then mentioned to him that there were two individuals who were talking against him with regards to several murders and murder conspiracies, one of them being the murder of Lee Carter. . . And he answered me, you know what happened to Carter, I blew him up; he didn't come to testify; and the other two won't come to testify either.[4]

[4] Agent Trudel repeated his testimony about "two separate murder cases" and Agent Morin likewise testified that "Mr. Trudel told Mr. Vallee that there were two people who

We find no abuse of discretion in admitting this testimony.[5]

First, Vallee concedes that his admission, "you know what happened to Carter, I blew him up; he didn't come to testify," was properly admitted.

Second, Vallee's statement, "the other two won't come to testify either," was properly admitted as proof of the charged crime. Vallee's use of the word "either" clearly referred to Carter. Thus, his statement that "the other two won't come to testify either" was not admitted to prove that Vallee had a propensity for killing or threatening potential witnesses. *See* Fed. R. Evid. 404(a). Rather, the statement "constituted important proof of the charged crime[ ]" and was admissible without regard to Rule 404 because it was "part of the very act charged, or, at least, proof of that act." *Quinones*, 511 F.3d at 309 (internal quotation marks omitted).

Finally, Agent Trudel's statement that "there were two individuals who were talking against him with regards to several murders and murder conspiracies" was properly admitted for the purpose of providing the context necessary to understand Vallee's statements. Vallee's statement that "the other two won't come to testify either" would have been unintelligible without also admitting Trudel's statement, which provided the context necessary to

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were willing to testify for the conspiracies to murder and murders that Mr. Vallee would have committed."

[5] Accordingly, we need not decide whether Vallee properly objected at trial and preserved this issue for appeal.

understand to whom "the other two" referred. *See United States v. Sorrentino*, 72 F.3d 294, 298 (2d Cir. 1995). Furthermore, Vallee's counsel argued to the jury that Vallee's alleged admission ("I blew him up") was not credible and should not be believed. Given this argument, it was particularly important to provide the jury with the entire context of the conversation, which revealed that Vallee was boasting about having killed Carter. Thus, because this statement was offered, not as proof of "other crimes, wrongs, or acts," but rather as part of the proof of Vallee's admission to the crime for which he was charged, Rule 404(b) was not implicated. Given the substantial probative value of Vallee's admission, we do not find that that district court abused its discretion in declining to exclude the testimony under Rule 403.

Vallee argues that the Jencks Act, 18 U.S.C. § 3500, required the exclusion of Agents Trudel's and Morin's testimony because "quick notes" taken by Morin during their interrogation of Vallee were discarded after Morin used those notes to compile an official report of the interrogation. Trudel and Morin were Canadian agents who questioned Vallee in Canada, and—as noted by the district court—"[t]here is no evidence that American officials controlled, directed, participated in or were, in any way, involved with the Canadian authorities in the . . . questioning." Nor was there evidence that American officials asked Canadian officials to arrest Vallee. "The Government is not under an obligation to produce prior statements of foreign law enforcement officials that it does not possess."

United States v. Yousef, 327 F.3d 56, 129 (2d Cir. 2003). But "'even in the course of a joint investigation undertaken by United States and foreign law enforcement officials the most the Jencks Act requires of United States officials is a good-faith effort to obtain the statements of prosecution witnesses in the possession of the foreign government.'" *Id.* (quoting *United States v. Paternina-Vergara*, 749 F.2d 993, 998 (2d Cir. 1984)). There is no basis for concluding that the government failed to make the requisite good-faith effort in this case.[6] Thus, this claim is rejected.[7]

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[6] Even if the agents had been American, it is unlikely that they would have been required to preserve handwritten notes that were incorporated into a formal on the same day that the interview took place. *See United States v. Elusma*, 849 F.2d 76, 79 (2d Cir. 1988); *see also United States v. Barlin*, 686 F.2d 81, 92 (2d Cir. 1982) ("[A]ppellants do not question that the notes were made part of the agent's formal report. That being the case, the notes need not have been preserved and their destruction violated no Jencks Act right.").

[7] Vallee's argument that the admission of the agents' testimony, as well as that of the Canadian prosecutor, violated his due process rights is also without merit because the use of properly obtained and relevant statements that were more probative than prejudicial did not "violate[ ] those fundamental conceptions of justice which lie at the base of our civil and political institutions, and which define the community's sense of fair play and decency." *Dowling v. United States*, 493 U.S. 342, 353 (1990) (internal quotation marks and citations omitted).

We have reviewed Vallee's remaining arguments and find them to be without merit. For the reasons stated above, the judgment of the district court is AFFIRMED.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, Clerk

By: /s/ RICHARD ALCANTARA
Richard Alcantara, Deputy Clerk

[STAMP]

A TRUE COPY
Catherine O'Hagan Wolfe, Clerk

by /s/ KAREN [ILLEGIBLE]
DEPUTY CLERK

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

96-CR-284

UNITED STATES OF AMERICA,

v.

RICHARD VALLEE,

Defendant.

THOMAS J. MCAVOY,

Senior United States District Judge

DECISION & ORDER

I. INTRODUCTION

Defendant Richard Vallee is charged with violations of 18 U.S.C. §§ 2, 844(i), and 1512(a)(1)(C) surrounding the car bombing murder of Lee Carter in 1993. *See* Indictment 96-CR-284 [dkt. # 1]. Defendant filed an omnibus motion seeking, *inter alia*, suppression of evidence and statements. *See* Motion [dkt. # 10]. The Court ruled from the bench on the majority of the motions, *see* 4/9/07 Trans. [dkt. # 22], but reserved decision on the issue of whether the forfeiture-by-wrongdoing exception to the hearsay rule, Fed. R. Evid. 804(b)(6), allows

admission of Carter's identification of Defendant as a suspect in an another crime. On June 13, 2007, the Court held a hearing on that issue and allowed Defendant to present any further evidence he might have regarding whether the Canadian officials who arrested and questioned Defendant about Carter's murder were working with authorities from the United States. The Government called two witnesses, Surete du Quebec Investigators Yves Trudel and Denis Morin;[1] offered other evidence and statements, *see* Govt's Ex. 1-3;[2] and made a proffer of certain evidence which, the parties agreed, could be established if witnesses on those issues had been called. *See* 6/13/07 Hearing Trans. p. 66-67.[3] The following constitutes the Court's findings of fact and conclusions of law relative to the issues raised at the hearing.

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[1] The Surete du Quebec is the police force for the Province of Quebec, Canada.

[2] Government Exhibits 1 & 2 were admitted on consent for purposes of the hearing. The defense objected to the admission of Exhibit 3, which the Court reserved on. As explained in footnote 7, *infra*, while Exhibit 3 is otherwise admissible for purposes of the hearing, the Court has not considered the evidence contained therein because it is unnecessarily cumulative.

[3] At the hearing, the defense stipulated that the Government could proceed by way of proffer on certain evidence surrounding issues raised at the hearing. This proffered evidence is set out in footnotes 5 and 6, *infra*.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

a. The forfeiture-by-wrongdoing exception

The Government seeks to offer statements made by the murder victim, Lee Carter, that implicated Vallee in an illegal conspiracy to import 54 kilograms of cocaine into Canada in the early 1990s. Vallee objects, arguing that admission of such evidence would violate his right under the Confrontation Clause of the Sixth Amendment and is inadmissible hearsay.

The Second Circuit Court of Appeals recently addressed the same argument, writing:

> The Confrontation Clause of the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. Nonetheless, "'the law [will not] allow a person to take advantage of his own wrong,'" *United States v. Mastrangelo*, 693 F.2d 269, 272 (2d Cir. 1982) ("*Mastrangelo*") (quoting *Diaz v. United States*, 223 U.S. 442, 458, 32 S. Ct. 250, 56 L.Ed. 500 (1912) (other internal quotation marks omitted)) (brackets ours), and it is thus well established, as a matter of "[s]imple equity" and "common sense," that the right to confrontation is forfeited if the defendant has "wrongfully procured the witnesses' silence through threats, actual violence or murder,"

United States v. Dhinsa, 243 F.3d 635, 651 (2d Cir.) ("*Dhinsa*") (internal quotation marks omitted), cert. denied, 534 U.S. 897, 122 S. Ct. 219, 151 L. Ed.2d 156 (2001). *See, e.g., id.* at 652 ("'It is hard to imagine a form of misconduct more extreme than the murder of a potential witness. . . . We have no hesitation in finding, in league with all circuits to have considered the matter, that a defendant who wrongfully procures the absence of a witness or potential witness may not assert confrontation rights as to that witness.'" (quoting *United States v. White*, 116 F.3d 903, 911 (D.C. Cir.), *cert. denied*, 522 U.S. 960, 118 S. Ct. 390, 139 L. Ed.2d 305 (1997))); *United States v. Miller*, 116 F.3d 641, 667-68 (2d Cir. 1997), *cert. denied*, 524 U.S. 905, 118 S. Ct. 2063, 141 L. Ed.2d 140 (1998); *United States v. Thai*, 29 F.3d 785, 814 (2d Cir.), *cert. denied*, 513 U.S. 977, 115 S. Ct. 456, 130 L. Ed.2d 364 (1994); *United States v. Aguiar*, 975 F.2d 45, 47 (2d Cir. 1992); *Mastrangelo*, 693 F.2d at 272-73; *United States v. Cherry*, 217 F.3d 811, 814-15 (10th Cir. 2000); *Steele v. Taylor*, 684 F.2d 1193, 1201-02 (6th Cir. 1982), *cert. denied*, 460 U.S. 1053, 103 S. Ct. 1501, 75 L. Ed.2d 932 (1983); *United States v. Carlson*, 547 F.2d 1346, 1358-60 (8th Cir. 1976), *cert. denied*, 431 U.S. 914, 97 S. Ct. 2174, 53 L.Ed.2d 224 (1977). *See also Crawford v. Washington*, 541 U.S. 36, 62, 124 S. Ct. 1354, 158 L. Ed.2d 177 (2004) ("the rule of forfeiture by wrongdoing

> (which we accept) extinguishes confrontation claims on essentially equitable grounds").

United States v. Stewart, 485 F.3d 666, 670 (2d Cir. 2007).

In recognition of the need for a formal rule in this respect, the Federal Rules of Evidence were amended in 1997 to include Rule 804(b)(6). *Id.* Rule 804(b)(6) exempts from the hearsay rule "[a] statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness." Fed. R. Evid. 804(b)(6). Pursuant to Fed. R. Evid. 804(b)(6),

> the district court may admit hearsay evidence as to statements by an unavailable declarant if it finds by a preponderance of the evidence, *see* Fed. R. Evid. 804 Advisory Committee Note (1997): Fed. R. Evid. 104(a), that (a) the "party against whom the out-of-court statement is offered[ ] was involved in, or responsible for, procuring the unavailability of the declarant through knowledge, complicity, planning, or in any other way," and (b) that the party "acted with the intent of procuring the declarant's unavailability as an actual or potential witness." *Dhinsa*, 243 F.3d at 653-54.

Stewart, 485 F.3d at 670-71. The evidence presented at the June 13th hearing establishes both elements for admission of Carter's hearsay statements.

The credible evidence establishes that in 1992, the murder victim, Lee Carter, cooperated with United State and Canadian officials in the investigation of the attempted importation of 54 kilograms of cocaine from New York State to Montreal, Canada.[4] Following the controlled delivery of the drugs in Montreal, Carter selected Vallee's photograph from an array and indicated that Vallee was involved in the conspiracy to smuggle the 54 kilograms of cocaine into Canada. Vallee and others were arrested and charged in Canada with conspiracy to import illegal drugs. All co-defendants except Vallee pleaded guilty prior to trial, but all refused to cooperate against Vallee.

Vallee's trial was set to commence in September of 1993. The Canadian prosecutor told Vallee's lawyer in Canada that Carter was the only witness against Vallee. *See* 6/13/07 Hearing Trans. p. 67-68.[5] On July 28, 1993, Carter was killed when his

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[4] Unless indicated otherwise, the factual findings set forth in the text are based upon the testimony of Surete du Quebec Investigators Yves Trudel and Denis Morin, both of whom the Court found to be credible witnesses.

[5] The Government makes the following proffer in this regard:

> With regard to Vallee's trial in Canada, the evidence is expected to show that it was scheduled to start on September 7, 1993, that the Canadian prosecutor told Vallee's lawyer in Canada that Carter was the only witness against Vallee, and that once Carter was murdered on July 28, 1993, the Canadian prosecutor was forced to adjourn, and ultimately to dismiss, the case against Vallee.

Govt. Mem. L. p. 4.

car exploded outside his home in Rouses Point, New York as he attempted to start it. The drug conspiracy charges against Vallee were dismissed for lack of evidence. *Id.*; *see* fn. 5, *supra*.

During a subsequent investigation into Carter's murder, Canadian police found bomb making material that linked Vallee to the explosion that killed Carter. *Id.*[6] Agents of the Surete du Quebec also received a tip that Vallee had bragged that he

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[6] In this regard, the Government makes the following proffer:

> [T]he evidence is expected to show that in a search conducted on February 10, 1994, Montreal Urban Police executed one search warrant for Vallee's apartment, # 207, 500 Rue de la Montagne, and a second search warrant for a Honda Civic belonging to one Carlo Farruggia. One of the items recovered from the Honda Civic was a salmon and yellow CXA detonator—(the same detonator used in the murder of Carter). In an unrelated search conducted on November 10, 1994, Surete du Quebec agents executed a search warrant at Apartment 208 V'anjou, 7100 Girard (leased to Martin Ross), where they found bomb-making materials, including, in a bag with Vallee's fingerprint on it, a delay switch, batteries and packs, tools, and four pagers. (Another Vallee fingerprint was lifted from one of the battery packs found in this bag.) Discovered elsewhere in the apartment were green and blue CXA detonators, and Superfrac 4000, a sausage shaped, water based explosive. (Superfrac 4000 is consistent with the explosive used to murder Carter.) On the Superfrac 4000 was a fingerprint of Carlo Farruggia (the same person from whose vehicle, ten months earlier, a salmon and yellow CXA Constadet detonator had been recovered).

Govt. Mem. L. pp. 4-5.

killed Carter.[7] On April 3, 1995, Surete du Quebec agents arrested Vallee in Three Rivers, Quebec. Investigators Yves Trudel and Denis Morin went to the Surete du Quebec headquarters in Three Rivers

[7] Investigator Trudel testified that the tip was received from Serge Quesnel, a purported contemporary of Vallee's in the Hell's Angles motorcycle gang. At the hearing, the Government offered a transcript of Quesnel's August 28, 1996 Grand Jury testimony in the instant case, and Quesnel's January 25, 1997 affidavit prepared in connection with the proceeding to extradite Vallee from Canada for the instant prosecution. In both documents, Quesnel testified that he heard Vallee admit to killing Carter. The Government offered the documents because Quesnel, who is currently serving a life sentence in Canadian custody for murder, could not be compelled to testify in the United States because he would not consent to traveling to the United States—a precondition in such circumstances under the applicable treaty between the Untied States and Canada. Defense counsel objected to the Court considering Quesnel's testimony because Quesnel, a self-admitted "hit man" for the Hell's Angels, is "inherently, irrefutably, incredibly unreliable." Hearing Trans., p. 65.

While hearsay evidence may be admitted at a pretrial hearing, *see* Fed. R. Evid. 104(a); *United States v. Yousef*, 327 F.3d 56, 145 (2d Cir. 2003) (rejecting defendant's contention that the Court improperly considered hearsay affidavit in deciding suppression issue); *United States v. $557,933.89, More or Less, in U.S. Funds*, 287 F.3d 66, 84 (2d Cir. 2002) ("[I]t is well-settled that hearsay may properly be considered by a court in determining a suppression motion."), the Court need not venture onto the slippery slope of determining how much weight to give Quesnel's hearsay statements because the essential fact for which his hearsay testimony is offered—that Vallee admitted to killing Carter—is established by a preponderance of the evidence through the in court testimony of Investigators Trudel and Morin. Thus, the hearsay from Quesnel is unnecessarily cumulative and need not be considered.

and brought Vallee to an interrogation room for questioning. Agent Trudel advised Vallee that he had been arrested for the murder of Lee Carter, that Vallee did not have to say anything, and that Vallee had the right to speak with an attorney. Vallee replied that he had just seen a lawyer, but he did not otherwise invoke his right to speak with an attorney at that time. Agent Trudel then told Vallee that the police had two witnesses who would testify against him for the murder of Lee Carter. Vallee responded, in substance, that he had blown up Carter and he did not testify in the drug conspiracy case, and that the two witnesses would not testify against him in the murder case either. Vallee also bragged that an earlier weapons dealing charge against him had been dismissed. Investigator Morin took notes while the questioning ensued. As was the practice of the Surete du Quebec at the time, the interview was not recorded or videotaped.

In keeping with Surete du Quebec's practices, Investigator Morin prepared a summary of the interview session immediately after questioning Vallee. Morin and Trudel reviewed the summary for accuracy and both initialed each page of the summary, and signed the last page, indicating their agreement with its contents. *See* Govt. Ex. 1. Also in keeping with Surete du Quebec's practices, Morin's contemporaneous notes of the questioning were discarded. The summary reflects Vallee's admission that he had blown up Carter and that he made the other statements attributed to him during the questioning.

The Court finds that the evidence presented at the hearing, including the proffered evidence consented to by the defense, is sufficient to carry the government's burden of showing, by a preponderance of the evidence, that Vallee "'was involved in, or responsible for, procuring the unavailability of [Carter] through knowledge, complicity, planning, or in any other way,' and that [Vallee] 'acted with the intent of procuring [Carter's] unavailability as an actual or potential witness.'" *Stewart*, 485 F.3d at 670-71 (quoting *Dhinsa*, 243 F.3d at 653-54). Simply stated, there is sufficient credible evidence to establish, by a preponderance of the evidence, that Defendant blew up Carter so that Carter could not testify against him on the Canadian drug charges. Statements made by Carter need not be precluded on the grounds that they are hearsay, *see* Fed. R. Evid. 804(b)(6), and the admission of such statements at trial does not violate Defendant's right under the Confrontation Clause of the Sixth Amendment. *Davis v. Washington*, 126 S. Ct. 2266, 2280 (2006)("one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation."); *Crawford*, 541 U.S. at 62 ("the rule of forfeiture by wrongdoing . . . extinguishes confrontation claims on essentially equitable grounds."); *Stewart*, 485 F.3d at 670. Defendant's motion to preclude this evidence at trial is denied.

b. Suppression of Statements Made to Canadian Police

Vallee also seeks to suppress his statements made to Canadian law enforcement investigators on April 3, 1995. He maintains that the statements should be suppressed because he made them without the benefit of proper constitutional warnings and without access to an attorney. "[T]he law is settled that statements taken by foreign police in the absence of *Miranda* warnings are admissible if voluntary." *United States v. Yousef*, 327 F.3d 56, 145 (2d Cir. 2003); *see Miranda v. Arizona*, 384 U.S. 436, 444 (1966). "There are two exceptions to this rule. One exception is the 'joint venture' doctrine, under which statements elicited during overseas interrogation by foreign police in the absence of *Miranda* warnings must be suppressed whenever United States law enforcement agents actively participate in questioning conducted by foreign authorities." *Yousef*, 327 F.3d at 145. "The second exception to the general admissibility of voluntary statements taken by foreign officials is that any such statements obtained under circumstances that 'shock the judicial conscience' will be suppressed." *Id.* at 146.

Vallee does not claim the second exception applies, and, even if he did, it would not result in suppression because the Courts finds no evidence that the investigation occurred under circumstances that shock the judicial conscience. Questioning by Investigators Trudel and Morin was proceeded by warnings that Defendant (1) was being arrested for the

murder of Lee Carter; (2) did not have to speak to the investigators if he did not want to; and (3) had the right to an attorney. Defendant apparently disregarded those warning and, for a short period of time, freely spoke to the investigators. During the questioning, Defendant was allowed to use the bathroom and, when he decided he no longer wished to speak with investigators, was returned to his holding cell. The circumstances of the questioning do not shock the judicial conscious.

The Court also finds that the joint venture exception does not apply. To qualify as a joint venture, Vallee must demonstrate that United States officials were substantially involved with the Canadian authorities or that the Canadian authorities were acting as agents or employees of United States officials. *United States v. Covington*, 783 F.2d 1052, 1056 (9th Cir. 1985). This is a question of fact to be resolved in each case. *United States v. Toscanino*, 500 F.2d 267, 280 (2d Cir. 1974).

No one besides Trudel, Morin, and Vallee were present during the questioning of Vallee on April 3, 1995. There is no evidence that American officials controlled, directed, participated in or were, in any way, involved with the Canadian authorities in the April 3, 1995 questioning. Further, there is no evidence that Vallee was arrested at the behest of officials from the United States. Even assuming, *arguendo*, that United States officials sought Canadian assistance in arresting Vallee for Carter's murder, that still would be insufficient to rise to the level of a joint venture. *Yousef*, 327 F.3d at 146.

The Court concludes that Defendant has presented no meritorious basis to suppress the statements he made to Canadian authorities during the interview that commenced on April 3, 1995. Accordingly, that portion of his motion is **denied**.

III. CONCLUSION

For the reasons set forth above, Defendant's motion to preclude the admissibility of Lee Carter's statements which identify Defendant as a suspect in the 1992 drug conspiracy in Canada is **denied**. Defendant's motion to suppress statements he made to Canadian authorities during the interview that commenced on April 3, 1995 is also **denied**. Still left unresolved is the admissibility of the potential in court identification of Vallee by one of Carter's neighbors. The Court **reserves** on that portion of Defendant's motion and will address that issue at, or immediately before, trial.

IT IS SO ORDERED.

Dated: June 19, 2007

/s/ Thomas J. McAvoy
Thomas J. McAvoy
Senior, U.S. District Judge